

E-FILED on 7/1/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

WINDSOR AUCTIONS, INC., a Florida
corporation, and JEWELRY AUCTIONS
CORPORATION, a New Jersey corporation,

Plaintiffs,

v.

EBAY, INC., a Delaware corporation,

Defendant.

No. C-07-06454 RMW

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO DISMISS

[Re Docket No. 10]

On December 21, 2007, plaintiffs Windsor Auctions, Inc. and Jewelry Auctions Corporation ("plaintiffs") sued defendant eBay, Inc. ("eBay"). Plaintiffs' complaint purportedly sets forth claims for violation of the Robinson-Patman Act, 15 U.S.C. § § 13 *et seq.*; violation of the California Unfair Practices Act, Cal. Bus. & Prof. Code § 17045; common law unfair competition; and breach of the implied covenant of good faith and fair dealing. eBay moves to dismiss plaintiffs' complaint for failure to state a claim. For the reasons discussed below, the court grants eBay's motion with prejudice with regard to plaintiffs' Robinson-Patman Act claim, grants eBay's motion without prejudice as to plaintiffs' Unfair Practices Act and common law unfair competition claims, and denies eBay's motion with respect to plaintiffs' claim for breach of the implied covenant of good faith and fair dealing.

I. BACKGROUND

A. Factual Background

Plaintiffs are in the business of selling jewelry. Compl. ¶ 10. eBay owns and operates the largest online marketplace in the world at its website located at www.ebay.com. *Id.* ¶ 7. In addition to facilitating direct sales transactions between users, it also facilitates live auctions through its live auctions site at www.ebayliveauctions.com ("eBay Live Auctions"). *Id.*

In 2002, Live Auctioneers LLC ("Live Auctioneers") established a partnership with eBay to help bring auction catalogs to the Internet for online live bidding. *Id.* ¶ 8. Live Auctioneers offers a technology and services that connects auction houses and bidders through eBay Live Auctions. *Id.*

In 2005, plaintiff Windsor Auctions entered into a written agreement with Live Auctioneers. *Id.* ¶ 10. At the same time, Windsor Auctions entered a written agreement with eBay ("eBay-Windsor Agreement").¹ Pursuant to the eBay-Windsor Agreement, eBay agreed to provide Windsor Auctions with "the services and technology" necessary to enable Windsor Auctions conduct live jewelry auctions on eBay Live Auctions, including "the tools associated with eBay such as Mr. Lister." eBay-Windsor Agreement §§ 4(a), 1(j).

From mid-2005 through 2006, sales for Windsor Auctions through eBay's Live Auctions were at least \$1.4 million. *Id.* ¶ 10. Although they expected to see their sales increase to \$2.8 million in 2007, plaintiffs realized instead in mid-2007 that their sales through eBay's Live Auctions were decreasing. *Id.* ¶ 11. During the same period, plaintiffs allege that the sales of a competitor that also conducts live auctions through eBay Live Auctions were increasing. *Id.* ¶ 12. This competitor, George Molayem, runs a variety of businesses, including Hillstreet Jewelers, Paramount Auctions and Jewelry Overstock Auctions. *Id.* Molayem allegedly does not use the intermediary services of Live Auctioneers, but is a direct client of eBay. *Id.* Plaintiffs assert that they discovered that Molayem had access to what they characterize as "an auction time-duration tool" or "Batch

¹ eBay asks the court to take judicial notice of the eBay-Windsor Agreement as it is referenced in the complaint in paragraphs 10 and 31. The eBay-Windsor Agreement is referenced in the Declaration of Adam Sand, paragraph 2 and was filed under seal by eBay. Plaintiffs do not dispute the authenticity of this document nor do they object to this request. *See* Opp'n at 4 n.4. Accordingly, the court finds it appropriate to take judicial notice of the eBay-Windsor Agreement, which eBay has submitted to this court under seal.

1 Uploading Tool" that allowed Molayem to upload auction items in batches, thereby consistently
 2 placing his items for sale at the front of eBay's "core listings" no matter when his auctions ended.
 3 *Id.* ¶ 13. eBay's "core listings" appear first in sales listings on the website. *Id.* Plaintiffs assert that
 4 the Batch Uploading Tool was not available to them, and that, as a result, their listings were listed
 5 toward the end of total listings until a few hours before the listed auction ended. *Id.* Plaintiffs allege
 6 that eBay has been aware of Molayem's use of the Batch Uploading Tool and at first secretly
 7 allowed him to use the tool, but now openly permits the use of the tool. *Id.* ¶ 15. Plaintiffs further
 8 allege that the provision of the Batch Uploading Tool to Molayem has provided him with a
 9 competitive advantage as compared to other sellers like plaintiffs that were not provided access to
 10 the Batch Uploading Tool. *Id.*

11 II. ANALYSIS

12 Dismissal under Rule 12(b)(6) is proper only when a complaint exhibits either a "lack of a
 13 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."
 14 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). The court must accept the
 15 facts alleged in the complaint as true. *Id.* "A complaint should not be dismissed unless it appears
 16 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle
 17 him to relief." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997).

18 Federal Rule of Civil Procedure 8(a) requires complaints to contain "a short and plain
 19 statement of the claim showing that the pleader is entitled to relief." "[A]ntitrust pleadings need not
 20 contain great factual specificity" than other complaints. *Portland Retail Druggists Ass'n v. Kaiser*
 21 *Found. Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981). "However, the court is not required to
 22 accept legal conclusions cast in the form of factual allegations if those conclusions cannot
 23 reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752,
 24 754-55 (9th Cir. 1994). "Nor is the court required to accept as true allegations that are merely
 25 conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State*
 26 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

27 A. Robinson-Patman Act, 15 U.S.C. § 13 *et seq.*

28 The Robinson-Patman Act provides:

1 It shall be unlawful for any person engaged in commerce, in the course of such
2 commerce, either directly or indirectly, to discriminate in price between different
3 purchasers of commodities of like grade and quality, where either or any of the
4 purchases involved in such discrimination are in commerce, where such commodities
5 are sold for use, consumption, or resale within the United States or any Territory
6 thereof or the District of Columbia or any insular possession or other place under the
jurisdiction of the United States, and where the effect of such discrimination may be
substantially to lessen competition or tend to create a monopoly in any line of
commerce, or to injure, destroy, or prevent competition with any person who either
grants or knowingly receives the benefit of such discrimination, or with customers of
either of them

7 15 U.S.C. § 13(a). Section 13(a) provides that sales transactions are unlawful only if these six
8 separate judicial elements are present: "(1) Two or more contemporaneous sales by the same seller;
9 (2) At different prices; (3) Of commodities of like grade and quality; (4) Where at least one of the
10 sales was made in interstate commerce; (5) The discrimination had the requisite effect upon
11 competition generally; [and] (6) The discrimination caused injury to the plaintiff. *Rutledge v.*
12 *Electric Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir. 1975) (citations omitted).

13 2. Commodities

14 eBay argues that plaintiffs cannot state a claim under the Robinson-Patman Act because the
15 transaction at issue did not involve a commodity. As set forth above, section 2(a) of the
16 Robinson-Patman Act prohibits any person engaged in commerce "to discriminate in price between
17 different purchasers of commodities." 15 U.S.C. § 13(a). The Robinson-Patman Act's prohibition on
18 price discrimination thus extends only to transactions involving commodities. *May Dep't Store v.*
19 *Graphic Process Co.*, 637 F.2d 1211, 1214 (9th Cir. 1980); *see also Baum v. Investors Diversified*
20 *Services, Inc.*, 409 F.2d 872, 873 (7th Cir. 1969).

21 A sale of commodities is a "sale of 'goods, wares, or merchandise' and is not merely a
22 contract for services." *May*, 637 F.2d at 1214 (quoting *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*,
23 351 F.2d 851 (9th Cir. 1965)). The Ninth Circuit stated in *May* that there were "no congressional
24 discussions on the distinction between goods and services," and that "[l]egislative history reveals
25 only that Congress intended the Act to apply to tangible goods and not services." *May*, 637 F.2d at
26 1214 (quoting 79 Cong. Rec. 9079, June 11, 1935). "Courts have strictly construed" the term
27 "commodit[y]" and held "that it denotes only tangible products of trade." *Innomed Labs., LLC v.*
28 *Alza Corp.*, 368 F.3d 148, 155 (2d Cir. 2004) (quoting *May*, 637 F.2d at 1214).

1 In the complaint, plaintiffs describe eBay's business as follows: "eBay promotes the goods
2 and services of others by making available and facilitating a worldwide online marketplace through
3 which users may advertise their goods and services via the Internet. eBay facilitates direct sales
4 transactions between suers, and also facilitates live actions through its website located at
5 www.ebayliveauctions.com." Compl. ¶ 7. In their briefing in opposition to eBay's motion, plaintiffs
6 appear to assert that eBay provides as part of the eBay-Windsor Agreement the service described
7 above, as well as technology like the Batch Uploading Tool. They assert that this combination of
8 service and technology is a "commodity" for purposes of the Robinson-Patman Act.

9 A number of courts have considered whether particular services and technology are
10 commodities under the Robinson-Patman Act. "Consistent with decisions of the Seventh Circuit and
11 other courts, web site maintenance, an electronics retail franchise, credit card processing services,
12 and order processing services are not 'commodities' for purposes of the Robinson-Patman Act."
13 *Goodloe v. National Wholesale Co., Inc.*, 2004 WL 1631728 at *10 (N.D. Ill. 2004); *see also Advo*
14 *Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1195 n.3 (3d Cir. 1995); *First Comics, Inc. v.*
15 *World Color Press, Inc.*, 884 F.2d 1033, 1037 (7th Cir. 1989) (printing services provided to a comic
16 book publisher constitute a service rather than a commodity); *Ambook Enterprises v. Time, Inc.*, 612
17 F.2d 604 (2d Cir. 1979); *Columbia Broadcasting Systems, Inc. v. Amana Refrigeration, Inc.*, 295
18 F.2d 375 (7th Cir. 1961) (television broadcast time is not a commodity); *National Black Expo v.*
19 *Clear Channel Broadcasting, Inc.*, 2007 WL 495307 at *12 (N.D. Ill. 2007) (plaintiff's allegations
20 regarding discrimination in the sale of radio advertising time do not fall under the Robinson-Patman
21 Act); *Berlyn, Inc. v. The Gazette Newspapers, Inc.*, 157 F. Supp. 2d 609, 621 (D. Md. 2001)
22 (newspaper advertising is not a commodity); *Credit Chequers Info. Servs., Inc. v. CBA, Inc.*, 1999
23 WL 253600 at *12 (S.D.N.Y. 1999) (credit reports are services and thus not commodities); *Nat'l*
24 *Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81, 85-86 (D.D.C. 1977) (newspaper
25 advertising is not a commodity); *SCM Corp. v. Xerox Corp.*, 394 F. Supp. 384, 385 (D. Conn.1975)
26 (Robinson-Patman Act does not apply to leases and photocopier equipment lease requiring user to
27 pay a per copy charge was a lease of the copying process and thus a lease of a service rather than a
28 lease of a commodity); *LaSalle St. Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004,

1 1006 (N.D. Ill. 1968) (a patent license granting the right or privilege to use a particular method or
2 process is not a commodity).

3 "When a transaction involves both goods and services, the *May* court adopted the 'dominant
4 nature' test to determine how to characterize the transaction for the purposes of the Robinson-Patman
5 Act." *Standfacts Credit Services, Inc. v. Experian Information Solutions, Inc.*, 405 F. Supp. 2d 1141,
6 1156 (C.D. Cal. 2005) (quoting *May*, 637 F.2d at 1215). Plaintiffs urge the court to apply the
7 "dominant nature" test to determine that eBay has discriminated between two purchasers of
8 commodities. However, courts only apply the dominant nature test where "the subject of the
9 contract is a *combination* of goods and intangible rights and services." *Innomed Labs.*, 368 F.3d at
10 156 (emphasis added).

11 Here, plaintiffs contend that the transaction between eBay and Windsor Auctions involved
12 both goods and services primarily because plaintiffs received a manual for the Mr. Lister software
13 provided by eBay under the eBay-Windsor Agreement. *See, e.g.*, Decl. Gregory Skibbee ¶ 4.²
14 There is no allegation or argument that other than the manual there was no tangible component
15 exchanged between eBay and Windsor Auctions as part of the alleged transaction. Even assuming
16 that the eBay-Windsor Agreement is appropriately characterized as involving software, the provision
17 of a manual for software does not convert the transaction from one for a software service to one for
18 both tangible goods and services. Accordingly, there is no combination of goods and services to
19 which the court would apply the dominant nature test.

20 Even assuming that the Mr. Lister software could be considered a good in spite of the lack of
21 a tangible component, application of the "dominant nature" test would result in the conclusion that
22 the transaction between eBay and Windsor Auctions did not involve a commodity. Plaintiffs cite the
23 court's prior decision in *Ansel Communications, Inc. v. Novell, Inc.*, 1999 WL 33302368 (N.D. Cal.
24 1999) (Whyte, J.), for the proposition that software can be a commodity. But this is not an entirely
25 accurate characterization of the court's holding in that case. In *Ansel*, the court found that on the
26 facts before it on summary judgment, the court could not determine the "dominant nature" of the

27 ² Plaintiffs insist that this external evidence is not necessary, but that they bring it to the court's
28 attention to illustrate that their allegations are sufficient to survive eBay's motion to dismiss their
Robinson-Patman Act claim.

1 Novell NetWare software product that was the subject of the transaction challenged under the
2 Robinson-Patman Act. Novell argued that it merely licensed the right to use the NetWare software
3 to Ansel and other original equipment manufacturers; Ansel, on the other hand, presented evidence
4 that Novell treated its software transactions like sales of a product. *Id.* at *2-3.

5 Here, by contrast, aside from the manual, which, based on plaintiffs' declaration is clearly
6 meant only to explain the use of the software provided by eBay, plaintiffs present no evidence or
7 allegations suggesting that the subject of the eBay-Windsor Agreement was anything but an
8 intangible service and that the Mr. Lister software was intended to facilitate the provision of that
9 service. Under the eBay-Windsor Agreement, eBay grants Windsor a "non-exclusive, non-
10 transferable, royalty-free license to access and use the Online Service," where "Online Service" is
11 defined as "the services and technology (to enable Company to inventory, promote, organize online
12 and sell items through the eBay Services) provided to Company by eBay or eBay Affiliates,
13 including the use of Live Auctions and the tools associated with eBay such as Mr. Lister." eBay-
14 Windsor Agreement ¶¶ 1(j); 4(a). Even assuming that the "technology," specifically, the "tools
15 associated with eBay" could be considered to be goods in spite of a clear lack of any tangible
16 component, it is clear that the "dominant nature" of the transaction between eBay and Windsor was
17 the provision of access to "organize online and sell items through the eBay Services." The court
18 thus concludes that the transaction at issue is one for a service provided by eBay and the Robinson-
19 Patman Act is not applicable to the challenged transaction. Accordingly, the court need not reach
20 eBay's other challenges to plaintiffs' claim under the Robinson-Patman Act.³

21 **B. Unfair Practices Act, Cal. Bus. & Prof. Code § 17045**

22 Cal. Bus. & Prof. Code § 17045 provides:

23 The secret payment or allowance of rebates, refunds, commissions, or unearned
24 discounts, whether in the form of money or otherwise, or secretly extending to certain
25 purchasers special services or privileges not extended to all purchasers purchasing

26 ³ eBay's other grounds for challenging plaintiffs' Robinson-Patman Act claim are (1) that the eBay-
27 Windsor transaction does not involve the same seller as the eBay-Molayem transaction because
28 plaintiffs allege that they contracted for services through Live Auctioneers while Molayem was a
direct customer of eBay; (2) that plaintiffs' complaint contains no allegation that there was any
difference in pricing as between eBay and plaintiffs versus eBay and Molayem; and (3) that on the
facts pleaded, eBay would be entitled to the affirmative defense that an alternative is available.

upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

To state a claim under § 17045, a plaintiff must allege that the purchasers were purchasing on "like terms and conditions." *Eddins v. Redstone*, 134 Cal. App. 4th 290, 332-33 (2006). Although plaintiffs attempt to allege that "Plaintiffs use eBay's live auctions services on like terms and conditions as Mr. Molayem," Compl. ¶ 21, plaintiffs' factual allegations appear to establish that they were purchasing on different terms from Molayem. Plaintiffs allege that Molayem contracted for services directly from eBay. *Id.* ¶ 12 ("Mr. Molayem does not use the intermediary services of Live Auctioneers; rather, he is a direct client of eBay."). Plaintiffs, by contrast, acknowledge that they contracted for eBay services through Live Auctioneers but signed terms with eBay in connection with the Live Auctioneers relationship. Compl. ¶¶ 8, 10. Molayem's direct relationship with eBay creates different terms and conditions than those under which plaintiffs were provided services through Live Auctioneers. Accordingly, based on the present allegations, it does not appear that § 17045 provides a basis for relief.

C. Common Law Unfair Competition

Plaintiffs contend that they have adequately stated a claim for common law unfair competition based on negligent interference with economic relations. Plaintiffs contend that they have alleged a duty, breach, causation and injury. They fail, however, to specify what that "duty" is, particularly in light of the dismissal of their Robinson-Patman Act and Unfair Practices Act claims. Therefore, plaintiffs fail to state the claim that purportedly underlies their common law unfair competition claim. Accordingly, the court grants eBay's motion to dismiss this claim.

D. Covenant of Good Faith and Fair Dealing

"[A]ll contracting parties, whether they agree to it or not, are bound by the implied-in-law covenant of good faith and fair dealing, which 'prevent[s] one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made.'" *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 413 (2007) (citing *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 349 (2000)). Allegations which assert a claim for breach of the implied covenant of good faith and fair dealing "must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual

1 responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a
2 conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints
3 the reasonable expectations of the other party thereby depriving that party of the benefits of the
4 agreement." *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1395
5 (1990).

6 Here, plaintiffs have alleged that the terms of the eBay-Windsor Agreement was for eBay to
7 provide a Live Auction platform for plaintiffs to sell jewelry. Compl. ¶ 31. Plaintiffs have alleged
8 that eBay provided the Batch Uploading Tool to Molayem, but not to them, in order to increase the
9 visibility of Molayem's auction listings because Molayem's completed sales result in more revenue
10 for eBay than do completed sales by plaintiffs. *Id.* ¶¶ 13, 14, 15, 33. Although eBay contends that
11 the text of the eBay-Windsor Agreement demonstrates that plaintiffs had access to the same tools as
12 Molayem and instead chose to utilize the interface provided by Live Auctioneers instead of using the
13 tools used by Molayem, the court cannot conclude that the same tools would have been available to
14 both plaintiffs and Molayem. It is not clear to the court that the "Batch Uploading Tool" referred to
15 in the complaint is the same "Mr. Lister" tool (now apparently known as Turbo Lister) referenced in
16 the eBay-Windsor Agreement. Accordingly, plaintiffs' allegations that eBay provided to them a
17 listing tool that is potentially not the same listing tool as provided to Molayem sufficiently alleges a
18 claim for breach of the implied covenant of good faith and fair dealing. This claim would be
19 substantially weakened if eBay is able to demonstrate that plaintiffs elected to use the interface
20 provided by Live Auctioneers rather than the listing tools provided by eBay, but that is a factual
21 question not appropriately decided on a motion to dismiss.

22 **E. Dismissal With Prejudice**

23 eBay asks the court to dismiss plaintiffs' complaint with prejudice. Dismissal without leave
24 to amend is appropriate when the court is satisfied that the complaint's deficiencies cannot be cured
25 by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003). The court does not see how
26 plaintiffs could possibly overcome the deficiency in the Robinson-Patman Act, as the eBay-Windsor
27 transaction clearly does not involve a commodity. Accordingly, the court will dismiss the Robinson-
28 Patman Act with prejudice.

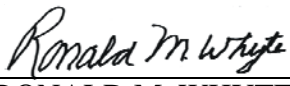
1 Plaintiffs' claim under California's Unfair Practices Act claim is, as currently alleged,
2 untenable, but it may be possible for plaintiffs to amend the complaint to assert that plaintiffs and
3 Molayem purchased from eBay on like terms and conditions. As currently stated, plaintiffs' factual
4 allegations flatly contradict the allegation that plaintiffs and Molayem purchased on like terms and
5 conditions. Because plaintiffs may be able to assert a duty based on the Unfair Practices Act for
6 purposes of their common law unfair competition claim, the court likewise dismisses that claim
7 without prejudice.

8 III. ORDER

9 For the foregoing reasons, the court

- 10 1. grants eBay's motion with prejudice with regard to plaintiffs' Robinson-Patman Act claim;
11 2. grants eBay's motion without prejudice as to plaintiffs' Unfair Practices Act and common law
12 unfair competition claims; and
13 3. denies eBay's motion with respect to plaintiffs' claim for breach of the implied covenant of
14 good faith and fair dealing.

15
16 DATED: 7/1/08

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18 RONALD M. WHYTE
19 United States District Judge
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12 **Dated:** 7/1/08

/s/ MAG
Chambers of Judge Whyte

United States District Court
For the Northern District of California